BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GUADALUPE LOERA Claimant	)	
VS.	)	
BG PRODUCTS, INC. Respondent	)	Docket No. **1,053,543**
AND	)	
STANDARD FIRE INS. CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the January 20, 2011 preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The claimant sought treatment for injuries to her neck, upper back, lower back, and legs as a result of alleged repetitive traumas. The parties agreed that November 8, 2010 would be the date of accident for purposes of the hearing. But respondent denied that claimant had suffered a new injury and instead argued that claimant's current condition was a natural and probable consequence of a work-related back injury with respondent which claimant had suffered in 2003 and had fully settled in 2004.

The Administrative Law Judge (ALJ) found claimant suffered a new accident on November 8, 2010, arising out of and in the course of her employment.

Respondent requests review of whether claimant's current need for medical treatment is a natural and probable consequence of her previous injury that occurred on August 26, 2003, versus a new injury on November 8, 2010. Respondent argues that claimant's increased symptoms do not equate to a new injury and therefore the ALJ's Order should be reversed.

Claimant argues that she sustained a new and distinct injury and therefore the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant was employed as line worker when she began working for respondent. She suffered an accidental injury to her low back while lifting a wooden pallet on August 26, 2003. Claimant was diagnosed with a herniated disk at L5-S1. Claimant elected not to have surgery and entered a pro se full and final settlement of her claim on October 22, 2004, for a 10 percent permanent partial impairment. Dr. Estivo provided that impairment rating and further provided claimant with restrictions of no lifting greater than 40 pounds and no more than one-third of a full workday of bending, twisting and stooping. Claimant returned to work for respondent doing the same job that she had been doing at the time of the accident. Claimant continued to have problems with her low back and right leg following her release from treatment in 2004 which she treated with Ibuprofen.

The last three to four years claimant has worked as a quality control technician for respondent. This job required her to open cases of product that were produced on the line and then inspect the product for quality control. Claimant was allowed to sit and inspect the product. Then in January 2010 a change in management occurred and claimant was not allowed to sit any more.

> Q. Now, explain to the judge, when you do your product quality control, what is it exactly that you do? What do you inspect?
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> A. There's cases, boxes with product coming out of the conveyors and we have to pull the case out to -- that's far away a few steps from the line to the table where we -- we perform the inspection. So we inspect every single product that's in the case. And then when it is done if it is okay we just take it back, carry it and take it back.[1]

Claimant testified that she was not working all of the time within her restrictions. A new product was introduced and claimant felt that it weighed more than 40 pounds. She testified that her back was hurting so she would sit down whenever she could to inspect the product. After advising her supervisor that her back was getting worse, she was referred by respondent to Dr. Mark Dobyns. Claimant had an appointment on November 4, 2010, with Dr. Dobyns and advised him that her symptoms had increased beginning in August 2010.

> Q. Was there some change in the way that you were performing your job that caused an increase in your symptoms in August of 2010?

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[1] P.H. Trans. at 10-11.

A. By upper management, I was just not able to sit down while I was performing my job.

Q. So you attempted to change the way that you did your job when you started having an increase in pain at the first of this year by taking advantage of some sitting opportunities.

A. Yes.

Q. And then in August of 2010 the management told you you could no longer do that.

A. Exactly.

Q. In fact, you received a verbal warning from them that you were wasting company time by sitting; correct?

A. Yes, correct.[2]

Claimant had increased pain in her lower back and right leg as well as pain in her upper back and neck. Claimant further testified that her job required bending and twisting that exceeded her restrictions. Reggie Graham, respondent's human resources director since June 2008, testified that claimant is working within her restrictions. But he also did not dispute claimant's testimony regarding her bending and twisting activities.

On November 4, 2010, claimant saw Dr. Dobyns but he never performed an examination of claimant. Instead, Dr. Dobyns reviewed the nature of claimant's treatment for the 2003 work-related injury, noted that claim had been fully settled, reviewed the terms of the settlement, noted she agreed additional medical would be her responsibility and that he was thus confused about why he was supposed to examine her since her present complaints were a continuation of her pain from her original injury.

On January 14, 2011, Dr. John Estivo examined and evaluated claimant after having been claimant's treating physician for the 2003 accidental injury. Dr. Estivo concluded that claimant's current complaints were the natural consequence of the 2003 injury.

At claimant's attorney's request, Dr. George Fluter examined and evaluated claimant. She testified that she is now having problems with her middle and upper back as well as her neck which she did not have with the previous accidental injury. Dr. Fluter diagnosed claimant with low back pain, myofascial pain affecting the lower back, neck/upper back pain/tenderness, myofascial pain affecting the neck/upper back, probable bilateral sacroiliac joint dysfunction, and probable bilateral trochanteric bursitis. Dr. Fluter

[2] P.H. Trans. at 15.

opined there was a causal relationship between claimant's condition and her work-related activities especially since the change in her work activities.

The ALJ concluded claimant's back problems significantly increased because new management would not let her occasionally sit while working which had previously been allowed. And the ALJ concluded claimant suffered accidental injury arising out of and in the course of her employment on November 8, 2010.

Respondent argues that claimant's condition is a natural and probable consequence of her 2003 back injury.

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson,*[3] the court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman,*[4] the court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig,*[5] the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an

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[3] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[4] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[5] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber,*[6] the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."[7]

In *Logsdon*,[8] the Kansas Court of Appeals reiterated the rules found in *Jackson* and *Gillig*:

> Whether an injury is a natural and probable result of previous injuries is generally a fact question.
>
> When a primary injury under the Worker's Compensation Act is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.
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> When a claimant's prior injury has never fully healed, subsequent aggravation of that same injury, even when caused by an unrelated accident or trauma, may be a natural consequence of the original injury, entitling the claimant to postaward medical benefits.

The evidence in this case establishes that claimant controlled her ongoing back and right leg pain with Ibuprofen after she returned to work. But after her job changed she not only had increased low back pain but also developed pain in her middle and upper back as well as her neck. And it appears that her work on occasions exceeded her restrictions. In situations such as this, there is often a very fine line between what would be described as a new and separate accidental injury versus a natural consequence of the original injury. In this instance, based upon the record compiled to date, this Board Member finds that claimant's condition did arise out of his employment with respondent and is not a natural consequence of the original injury with respondent. Accordingly, the ALJ's Order is affirmed.

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[6] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

[7] *Id.* at 728.

[8] *Logsdon v. Boeing Company*, 35 Kan. App. 2d 79, Syl. ¶¶ 1-3, 128 P.3d 430 (2006)

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[10]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge John D. Clark dated January 20, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2011.

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HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Sylvia B. Penner, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge

[9] K.S.A. 44-534a.

[10] K.S.A. 2010 Supp. 44-555c(k).